

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 In the Matter of:

5  
6 LEHMAN BROTHERS HOLDINGS INC., Case No. 08-13555-scc

7  
8 Debtor.

9  
10 - - - - - x

11  
12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, New York

15  
16 October 6, 2016

17 12:30 PM

18  
19 B E F O R E :

20 HON SHELLEY C. CHAPMAN

21 U.S. BANKRUPTCY JUDGE

1     Hearing re:   Doc #52994 Plan Administrator's Objection to  
2     Demands for Postpetition Interest Related to Claim No. 28308  
3     filed by Garrett A Fail on behalf of Lehman Brothers  
4     Holdings. Inc.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25     Transcribed by:   Dawn South and Jamie Gallagher

1 A P P E A R A N C E S :

2 WEIL, GOTSHAL & MANGES LLP

3 Attorneys for Debtor

4 767 Fifth Avenue

5 Hew York, NY 10153-0019

6

7 BY: GARRETT A. FAIL, ESQ.

8 SCOTT BOWLING, ESQ.

9

10 SCHULTE ROTH & ZABEL LLP

11 Attorneys for Centerbridge Special Credit Partners II,

12 CCP Credit Acquisition Holdings, and Recovery Partners

13 919 Third Avenue

14 New York, NY 10022

15

16 BY: ALAN R. GLUCKMAN, ESQ.

17 MICHAEL KWON, ESQ.

18

19 MORGAN LEWIS

20 Attorney for Chase Lincoln First Commercial Corp.

21 101 Park Avenue

22 New York, NY 10178-0060

23

24 BY: JOSHUA DORCHAK, ESQ.

25

1 P R O C E E D I N G S

2 THE COURT: Please have a seat. How is everyone?  
3 Good to see everyone. How are you, Mr. Fail?

4 MR. FAIL: Very well, Your Honor. Yourself?

5 THE COURT: Okay. So we are here on the objection  
6 -- plan administrator's objection to certain postpetition  
7 interest claims.

8 MR. FAIL: Good afternoon, Your Honor. For the  
9 record Garrett Fail, Weil, Gotshal & Manges, here with my  
10 colleague, Scott Bowling, today on behalf of Lehman Brothers  
11 Holdings Inc, the plan administrator in these cases. Thank  
12 you, Your Honor, for making time this afternoon for us.

13 THE COURT: Sure.

14 MR. FAIL: I thought I would begin with a brief  
15 background and set the context for today's objection.

16 As Your Honor is aware there were originally 23  
17 Chapter 11 debtors in these cases. Eight cases have already  
18 been able to have been closed. Of those that are remaining  
19 four debtors have already satisfied all allowed unsecured  
20 claims in full. Those are the debtors that we refer to as  
21 Lot C, LBCC LBDP, and LBFP.

22 Before closing these cases and after resolving all  
23 claims and assets in them the plan administrator will need  
24 to determine the amounts of postpetition interest to pay and  
25 to make distributions in excess of that being reserved to

1 equity interests in accordance with the plan.

2 The plan provides in Section 8.13(c) for the  
3 payment of interest "at the rate applicable in the contract  
4 or contracts on which such allowed claim is based or absent  
5 such contractual rate at a statutory rate."

6 A brief update on the status of the postpetition  
7 interest demands generally I think would also be helpful,  
8 Your Honor.

9 There were a combined \$877 million of allowed  
10 third-party claims thus far against the debtors Lot C and  
11 LBCC collectively. Those came out of roughly 208 claims  
12 held by 95 unique claim holders.

13 The Court established, as Your Honor is aware, a  
14 bar date for demands against Lot C and LBCC, and that bar  
15 date order established the maximum that debtors would be  
16 liable for and limited the basis upon which demands for PPI  
17 could be made.

18 You'll recall, Your Honor, that we appeared  
19 approximately two years ago in some complex litigation that  
20 was eventually settled.

21 To date, Your Honor, I'm pleased to report that  
22 the plan administrator has resolved postpetition interest  
23 for 88 percent of the dollar amounts of allowed claims  
24 against Lot C and LBCC. That's approximately \$781 million  
25 in principal of claims out of the 887 million in principal,

1 leaving postpetition interest for claims with a face amount  
2 of 106 million of allowed remaining. That's 12 percent  
3 remaining to be resolved. Those that remain are held by  
4 only three holders. The remaining 92 claim holders have  
5 been resolved.

6 The 87.6 million in allowed claims before the  
7 Court today constitutes 83 percent of the remaining  
8 unresolved postpetition interest for allowed claims, and  
9 it's two out of the three holders. So once this matter is  
10 disposed of there'll be only one holder remaining with  
11 approximately \$18 million of face amount of a claim, 2  
12 percent of the total that has been allowed. So there really  
13 has been tremendous progress through settlements where  
14 settlements have been possible.

15 The demands at issue today are based on claims of  
16 an affiliate against LBCC. Your Honor, may recall that  
17 equity interests in LBCC are held by Lehman Brothers  
18 Holdings Inc. Today the maximum recovery by an LBHI  
19 creditor has been approximately 40 percent by one of the  
20 classes of claims, lower percentages by other classes  
21 pursuant to the plan.

22 So excess being reserved for postpetition interest  
23 demands at Lot C and LBCC will go to satisfy the principal  
24 of claims that have not yet been satisfied in full.

25 The postpetition bar date order, Your Honor may

1 recall, provided that the claims procedures established in  
2 these cases would apply. That's on page 4 of the  
3 postpetition bar date order.

4 So today we are treating this as a sufficiency  
5 hearing and the standard is that we will accept as arguendo  
6 the facts being asserted. The plan administrator believes  
7 that the Court can rule under those circumstances today and  
8 that would be the most efficient way of proceeding. We  
9 think it would be determinative without the need for further  
10 discovery or further proceedings.

11 Your Honor, I'll assume the Court's familiarity  
12 with the pleadings and the facts --

13 THE COURT: Yes.

14 MR. FAIL: -- and propose to just walk briefly  
15 through some of the relevant documents, turn to some of the  
16 specifics of the objection, and reserve any time to respond  
17 to arguments made by holders or answer any questions Your  
18 Honor has.

19 THE COURT: Okay. That sounds --

20 MR. FAIL: Of course unless you have another way  
21 that you propose to proceed.

22 THE COURT: That's fine. I have read everything,  
23 why don't you go ahead.

24 MR. FAIL: Thank you. And I have copies of any  
25 documents that you may need --

1 THE COURT: Okay.

2 MR. FAIL: -- if you do.

3 So we can start with the proof of claim that gave  
4 rise that started this. It's claim number 28308. It was  
5 filed on the bar date by the joint provisional liquidators  
6 of Lehman Re Ltd., which was an affiliate of the debtors.  
7 It asserted in excess of \$89.9 million. The details are  
8 limited in the claim and they're limited to one paragraph,  
9 it's paragraph 6. It references "one or more intercompany  
10 transactions or arrangements." And "funds deposited with  
11 LBCC." It does not identify any contract between LBCC and  
12 Lehman Re.

13 On February 28th, 2012, years later, the debtors  
14 filed a motion to approve a settlement with Lehman Re,  
15 that's at ECF number 25864. Noteworthy, Your Honor, this  
16 was after the plan was filed and after the plan was  
17 confirmed so all parties would be aware and familiar with  
18 the provisions of the plan.

19 Paragraph 8 of the motion that was filed with the  
20 Court described Lehman Re's assertion of approximately  
21 \$2.3 billion in claims against the various debtors, and the  
22 negotiations that led to the ultimate reduction of the  
23 claims to approximately \$1 billion. The motion included the  
24 statement that, "In addition, the debtors will benefit from  
25 certain releases from asserted and potential claims by



1 Lehman Re and certain of the Lehman Re creditors and their  
2 affiliates."

3 Noteworthy also, Your Honor, the motion described  
4 a net worth maintenance agreement between Lehman Re and  
5 LBHI, that's one contract. A master repurchase agreement  
6 between Lehman Re and LCPI, another debtor and another  
7 contract. An ISDA agreement between Lehman Re and LBSF,  
8 another agreement and another debtor. But it only described  
9 "certain undocumented foreign exchange transactions," with  
10 LBCC, and that's in paragraph 33 of the motion.

11 Consistent with that, Your Honor, the settlement  
12 did not reference a contract between Lehman Re and LBCC.  
13 But the settlement agreement was a contract between LBCC and  
14 Lehman Re, and it contained a number of provisions relevant  
15 to the current dispute.

16 Section 18.8 on page 36 of the settlement  
17 agreement provided that the settlement agreement embodied  
18 the entire agreement and understanding, and "supersedes all  
19 prior written or oral commitments, arrangements, or  
20 understandings."

21 Article VII on page 20 entitles arriving contracts  
22 provided that all other contracts between the Lehman U.S.  
23 parties on one hand and Lehman Re on the other shall be "of  
24 no force and effect as of the date hereof."

25 And Section 15.1 on page 30 provided that Lehman

1 Re release all claims, demands, damages, causes of action,  
2 whether based on contract or statute, against LBCC "arising  
3 under, in connection with, or relating in any manner to,"  
4 and then a little bit later "any of the documents,  
5 instruments, agreements, or transactions described in or  
6 contemplated by the proofs of claims filed by Lehman Re."  
7 It was all very clear.

8 In fact the order approving the settlement was  
9 likewise clear. That order is filed at ECF 27085, it was  
10 entered on March 22nd, 2012, after the plan was effective.

11 On page 3 of the order it states that all  
12 contracts between the Lehman U.S. parties on the one hand  
13 and Lehman Re on the other shall be "of no force and  
14 effect." And I have copies of any of these documents that  
15 Your Honor may need.

16 Turning to the postpetition interest demands  
17 themselves, Centerbridge Special Credit Partners II LP, CCP  
18 Credit Acquisitions Holdings LLC, Chase Lincoln First  
19 Commercial Corporation, and Lehman Re Ltd. filed  
20 substantially identical demands for postpetition interest  
21 based on their respective portions of the Lehman Re allowed  
22 claim that they held at the time. Copies of the demands  
23 were attached to a declaration that we filed. The  
24 declaration was by Ann Gahard Boudler (ph), she's a  
25 representative of Epic, and that was at ECF 52995, and

1 there's no dispute as to the authenticity of those demands.  
2 They are what they are.

3 Noteworthy, Your Honor, the demands do not  
4 identify a contract other than the settlement agreement, and  
5 here's the important phrase "on which the Lehman Re claim  
6 was based."

7 So we cited the demands and we quoted in our  
8 pleadings that they said, "They were not aware of an express  
9 written agreement governing the transfer of funds to LBCC  
10 and the management thereof." There are certain ellipses in  
11 there, but the pleadings have the proper citations.

12 The demands seek postpetition interests based on a  
13 contract rate, Your Honor, from a cash management manual  
14 that they attached, which provides for interest in certain  
15 circumstances at a rate of one week LIBOR flat reset daily,  
16 but the demands seek interest at LIBOR fixed as of LBCC's  
17 petition date.

18 So based on the foregoing the plan administrator  
19 filed its objection, and for either of two reasons the Court  
20 should find that the holders cannot demonstrate an  
21 entitlement to a contract rate of interest, and either one  
22 would be determinative of today.

23 First, assume arguendo that the GCCM as it's  
24 referred to sometimes or the draft as we refer to it or  
25 whatever the document is that was attached was relevant to

1       prepetition between LBCC and Lehman Re. In this case the  
2       settlement agreement nonetheless superseded it.

3               Section 18.8, as I read before, provided that the  
4       settlement agreement embodied the entire agreement and  
5       supersedes all prior written or oral commitments,  
6       arrangements, or understandings.

7               Article VII additionally said that any prepetition  
8       contract shall be "of no force and effect as of the date  
9       hereof."

10              Section 15.1 provided that Lehman Re released all  
11       claims arising under and in connection with relating to in  
12       any manner any of the documents, instruments, agreements,  
13       transactions described in or contemplated by the claims.

14              Section 13.2 of the settlement agreement provided  
15       that the agreement is enforceable with its terms. The  
16       settlement agreement itself contains no provision for a  
17       contract rate of interest. Therefore the holders are  
18       entitled to only interest at the statutory rate pursuant to  
19       the plan.

20              Now with this first objection alone the plan  
21       administrator rebutted the prima facie validity of the  
22       demand and shifted the burden back to the holders to  
23       demonstrate the validity of their demand. The holders only  
24       response to this, to the various separate provisions in the  
25       agreement and in the Court's order, is that they are

1 boilerplate.

2 So, Your Honor, you can find that the agreement is  
3 (indiscernible) and that it's not boilerplate, but you don't  
4 need to do that, because there is no law cited or otherwise  
5 that supports disregarding clear contract language whether  
6 it's boilerplate or not.

7 We cited cases to support our point, there's no  
8 cases cited to disregard all of the provisions.

9 They didn't and can't meet their burden to  
10 demonstrate that the settlement agreement is unenforceable,  
11 it should therefore be enforced, and even assuming that the  
12 Lehman Re claim is based on a prepetition contract, and it  
13 doesn't matter what that contract is and there would be no  
14 need for discovery to figure out if it's a final one, if  
15 there is one, a postpetition interest demand based on any  
16 contract would be denied, and the Court can rule on a  
17 sufficiency hearing basis on that point alone today.

18 But second and independently, Your Honor, the  
19 Court can find at a sufficiency hearing that the allowed  
20 Lehman Re claim is based on the settlement agreement. The  
21 settlement agreement is the contract on which the allowed  
22 Lehman Re claim is based.

23 Section 2.3 of that settlement agreement provides  
24 that "on the effective date the LBCC claim shall be allowed  
25 as an unsecured, non-priority affiliate claim against LBCC

1 in a fixed liquidated amount of \$87,621,000." And neither  
2 the proof of claim nor the demands identified any other  
3 contract on which the claim is based.

4 Again, with this second objection the plan  
5 administrator rebutted the prima facie validity of the  
6 demand and shifted the burden back to the holders to prove  
7 the validity of their demands.

8 In response to the second point, Your Honor, the  
9 holders made two arguments.

10 First they argue that the plan administrator  
11 previously admitted that the GCCM or the draft was the  
12 applicable contract rate for PPI, and we went through in  
13 detail why that just wasn't so. It was an assumption  
14 arguendo that was quoted and referenced in the holders  
15 papers and there was a broad reservations of rights in the  
16 first objection that was filed and withdrawn before there  
17 was any response to it.

18 Second, the holders argued that we conceded now  
19 that the pending objection -- in the pending objection that  
20 the GCCM provided applicable contract rate. Nothing could  
21 be further from the truth, and we cited why that just wasn't  
22 the case.

23 So the holders didn't and can't meet their burden  
24 to demonstrate that the allowed Lehman Re claim isn't the  
25 contract on which the settlement is based, and accordingly

1 their demands for PPI based on a contract rate must be  
2 denied.

3 So, Your Honor, if the Court agrees for either  
4 reason that the holders are not entitled to a contract rate  
5 then the Court must find that the holders are entitled to  
6 interest at the federal judgment rate. The holders seek an  
7 English statutory rate, but as set forth in the objection  
8 and the reply, there's absolutely no basis for such a rate.

9 If the Court disagrees with both of our arguments  
10 though and finds that the allowed Lehman Re claim may be  
11 based on a contract -- may -- then the holders are limited  
12 to the contract on which they can allege their demands, and  
13 that is the draft that they alleged.

14 So if the Court assumes arguendo, as it can, that  
15 the draft is the contract on which the claim is based, then  
16 it must find that the contract rate is floating and not  
17 fixed and U.S. dollar denominated.

18 As we said in our objection and the reply, there's  
19 absolutely no basis in contract or law to cherry pick  
20 provisions from the interest provisions to turn a floating  
21 rate into a fixed rate in its context.

22 The plan administrator is proposing to pay the  
23 claimant's interest at the federal judgment rate. The plan  
24 administrator thinks that's dictated by the facts and the  
25 law here and that would approximate \$6.4 million in

1 interest.

2 If the Court were to hold that the holders are  
3 entitled to look at the draft or the GCCM we think that  
4 you'll find that they're entitled to only \$1 million, Your  
5 Honor, which is obviously less than the \$6.4 million that  
6 the plan administrator was seeking. But we think that's  
7 what's required by law if we were to get to that juncture.  
8 So we were reminded of the old adage, be careful of what you  
9 ask for because you might get it.

10 I can address any of these arguments later in  
11 response to any arguments that the holders make, happy to  
12 answer any questions Your Honor.

13 THE COURT: Could you explain again, Mr. Fail, the  
14 difference between the two arguments? Because they both  
15 come to the same conclusion.

16 MR. FAIL: They do come to the same conclusion.

17 THE COURT: That the settlement agreement is  
18 dispositive, right? So even if you assume that the GCCM was  
19 an applicable contract you say it's superseded by the  
20 settlement agreement, right?

21 MR. FAIL: Right.

22 THE COURT: So if it's superseded by the  
23 settlement agreement -- if the settlement agreement is the  
24 contract --

25 MR. FAIL: Yes.



1 THE COURT: -- you're in the settlement agreement.

2 MR. FAIL: Yes.

3 THE COURT: One way or the other.

4 MR. FAIL: Agree.

5 THE COURT: Okay. Only lawyers could make two  
6 arguments about that one.

7 MR. FAIL: Well made two arguments because they  
8 want you to disregard the language that says it's  
9 superseded. The argument -- we made the arguments that the  
10 settlement agreement says --

11 THE COURT: I see.

12 MR. FAIL: -- it's superseded, and they said  
13 that's boilerplate. Don't read that, read everything else  
14 about settlement agreement.

15 THE COURT: I got it.

16 MR. FAIL: Read a billion dollars in allowed  
17 claims, but forget about the releases, forget about the  
18 other benefits of the bargains that were given.

19 So if Your Honor is inclined to accept that  
20 argument --

21 THE COURT: I see what you're saying.

22 MR. FAIL: -- we say well just look at the  
23 agreement. What is the contract that gave rise to this  
24 claim? It's the actual settlement agreement itself, it  
25 doesn't need to supersede anything else, this is the

1 agreement. And so for two independent closely related --

2 THE COURT: Got it.

3 MR. FAIL: -- reasons you get to the same point.

4 THE COURT: Okay. All right. Very good. Thank  
5 you.

6 MR. FAIL: Thank you, Your Honor.

7 THE COURT: All right.

8 MR. GLICKMAN: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. GLICKMAN: Alan Glickman, Schulte Roth &  
11 Zabel, and here at counsel table is my colleague, Michael  
12 Kwon.

13 THE COURT: Okay.

14 MR. GLICKMAN: We represent Centerbridge Special  
15 Credit Partners II, CCP Credit Acquisition Holdings, and  
16 Recovery Partners, they're all holders of claim 28308. The  
17 other holder is Chase Lincoln First Commercial Corp., which  
18 is represented by Josh Dorchak of Morgan Lewis, who's also  
19 at counsel table.

20 THE COURT: Okay.

21 MR. GLICKMAN: Now it's our turn to tell the  
22 story, and it used to be a pretty simple story until we had  
23 a change of objections by the plan administrator.

24 THE COURT: Well why am I talking about a change  
25 of objections? The plan administrator is here, has filed a

1 very straightforward document, and instead I'm being led on  
2 a 20-page ride -- a 23-page ride to English law and LIBOR  
3 rates. There's a settlement agreement, period. That's the  
4 basis of the claim. It's got words in it, it was approved  
5 by the Court, the parties could have negotiated for  
6 something else, they didn't. What more is there to the  
7 story?

8 MR. GLICKMAN: Let me jump to the settlement  
9 agreement argument, that's they're --

10 THE COURT: Okay. It's a valid settlement  
11 agreement, right?

12 MR. GLICKMAN: Correct, Your Honor.

13 THE COURT: Okay. It says very clearly this is  
14 the settlement agreement, here's the allowed amount of the  
15 claim, it supersedes everything else, we're done.

16 I simply -- I kept turning the pages and I had --  
17 I really was not able to follow.

18 MR. GLICKMAN: Okay. Can I give it a try?

19 THE COURT: You can give it a try, but you spent  
20 23 pages giving it a try and I simply -- the notion that  
21 there would be discovery about anything when the basis of  
22 the claim is the subject of a court-approved settlement  
23 agreement I just -- I can't even -- you can give it a try.

24 MR. GLICKMAN: Okay. So as Your Honor said, if  
25 the settlement agreement wipes away the GCCM, and that was

1 the applicable contract, then that's of course correct,  
2 there would be no discovery.

3 THE COURT: Then why doesn't -- why doesn't --

4 MR. GLICKMAN: Why doesn't it wipe it away?

5 THE COURT: Yeah.

6 MR. GLICKMAN: Okay. So let's look at -- the term  
7 contract is the term that's in the plan, right? So we have  
8 to decide if the settlement agreement is a contract within  
9 the meaning of the plan. Right? Because they're saying  
10 that's now the contract, it has no interest rate in it, so  
11 you don't have a contract-based interest rate so you go to  
12 the statutory rate.

13 THE COURT: What's the basis of the claim? Tell  
14 me what the basis of the claim is.

15 MR. GLICKMAN: The basis of the claim is what was  
16 set forth in our demand, which is that the GCCM system --

17 THE COURT: No, no, no. What's the -- what is the  
18 basis of the claim? It's the settlement agreement. That's  
19 the basis of the allowed claim. It provides the holders  
20 with an allowed claim, right?

21 MR. GLICKMAN: Well the settlement agreement, Your  
22 Honor, resolved the claim that we had, right? I mean that  
23 -- from our perspective what they're saying is look, once  
24 you have a settlement agreement that automatically becomes  
25 the basis of the claim -- I understand the argument -- and

1 it wipes away everything that happened. So let's just kind  
2 of walk through and see if that holds up.

3 THE COURT: So every settlement agreement that's  
4 been approved in these cases, somehow with the same language  
5 in it, somehow the plan administrator needs to be continuing  
6 to look at the underlying documents that led to the  
7 settlement, because in some instances claims have been  
8 alleged for tens of billions of dollars that have then be  
9 settled for a million dollars. So sometimes the language  
10 that says this is a settlement and it supersedes everything  
11 else actually means what it says, and sometimes it doesn't.

12 MR. GLICKMAN: We think it means what it says.

13 THE COURT: Okay.

14 MR. GLICKMAN: But we don't think it wipes away a  
15 prior contractual arrangement with respect to postpetition  
16 interest.

17 THE COURT: Why?

18 MR. GLICKMAN: Because it --

19 THE COURT: Why don't you read me the words as  
20 Mr. Fail did and give me a little way to get around that  
21 pretty extensive language that you characterize as  
22 boilerplate and that lawyers might characterize as covering  
23 all of their bases. I just -- I can't get past it. I think  
24 it's -- is it Section 15.1?

25 MR. GLICKMAN: Your Honor, we agree that all that

1 language speaks to the underlying claim that the settlement  
2 resolved. We agree with that completely. And the purpose  
3 of this settlement was to resolve the amount of the claim.

4 THE COURT: But not the interest.

5 MR. GLICKMAN: Correct. That is our position,  
6 Your Honor.

7 THE COURT: Based on what? Read the language.

8 MR. GLICKMAN: There's no mention whosoever of  
9 interest.

10 THE COURT: Well there's no mention whatsoever of  
11 anybody's dog either, that's because it would never occur to  
12 anybody that when you do a settlement agreement and you  
13 present it to a court for approval that somehow people just  
14 are not mentioning that despite the sweeping, expansive  
15 language stated in the alternative in the most thorough  
16 possible way lawyers can imagine, that somehow there's an  
17 unspoken carve out for a continuing claim of interest based  
18 on something else.

19 MR. GLICKMAN: It's a spoken carve out, Your  
20 Honor, in the release. The release specifically excludes --  
21 Lehman raised distribution entitlements under the plan.  
22 That's specifically excluded. Postpetition --

23 THE COURT: Right. That means it gets the  
24 distribution under and pursuant to the plan. That's the  
25 claim.

1 MR. GLICKMAN: But postpetition interest is a  
2 distribution entitlement under the plan. So we're not  
3 trying to enforce any underlying agreement, Your Honor,  
4 we're saying the plan says when you provide for postpetition  
5 interest you look and see if there was a contract that  
6 indicated what the postpetition interest rate was. We're  
7 not trying to enforce that contract per se, we're trying to  
8 enforce the plan which was accepted in the release.

9 THE COURT: What does that mean you're not trying  
10 to enforce that contract per se?

11 MR. GLICKMAN: We're trying to enforce the plan  
12 which references any prior agreement with respect to the  
13 claim. So the plan is carved out of the settlement.  
14 Distributions under the plan are carved out in the  
15 settlement release. So --

16 THE COURT: Sure, because when you settle you have  
17 to make sure that you're not waiving your right to a  
18 distribution. That's very basic and fundamental, there's  
19 nothing tricky or crafty about that. That's not a carve out  
20 that achieves the purpose that you are describing.

21 MR. GLICKMAN: Well --

22 THE COURT: You never -- in a settlement agreement  
23 the parties -- and I don't want to be led into a so-called  
24 factual determination, I'm making a general observation --  
25 it is entirely common in a settlement agreement to make sure

1 that the exchange of money that's going to occur pursuant to  
2 the settlement agreement is not released, because that would  
3 be rather silly. Of course there's going to be that  
4 obligation so that there's no basis for concluding that the  
5 language that you're citing to operators as anything more  
6 than that kind of a basic carve out.

7 MR. GLICKMAN: So what we'd be doing, Your Honor,  
8 if the Court holds that the settlement agreement wipes away  
9 any contract for purposes of postpetition interest, then  
10 when parties come to the settlement table they're taking the  
11 risk that in the settlement agreement whatever prior  
12 understanding they had with respect to something that wasn't  
13 at all the subject of the settlement negotiations, the  
14 settlement negotiations had to do with the claim amount, not  
15 the issue of postpetition interest. And I agree, there's  
16 very broad language that wipes away prior agreements with  
17 respect to what the subject matter was of the settlement  
18 agreement. But the reality is, Your Honor, when that  
19 settlement agreement was negotiated, which is true to any  
20 settlement agreement for any claim, the subject is the  
21 claim, not the postpetition interest, that's a separate  
22 stage, that's a separate phase.

23 So we agree, you don't have to go back and look at  
24 anything else with respect to the claim itself, that's what  
25 was dealt with in the settlement agreement. But if parties



1 are going to be told that the settlement agreement is going  
2 to wipe away any potential postpetition interest pursuant to  
3 a contractual understanding that's discouraging settlement,  
4 that's not the --

5 THE COURT: No, it's absolutely not discouraging  
6 settlement, it's the opposite. When parties settle they  
7 settle, we're done, everything is over. We're not just  
8 settling -- we're not just liquidating. You are conflating  
9 liquidating a claim amount with a settlement. This was not  
10 a mere liquidation of a claim amount, this was a settlement  
11 agreement. Read the language.

12 MR. GLICKMAN: So I would argue, Your Honor, if in  
13 fact the settlement agreement put to rest everything then  
14 why are we here? This is a separate phase of the  
15 proceedings, it's a separate aspect of what we're doing. If  
16 in fact the settlement agreement ended everything there  
17 would have been no need for us to put in a demand for  
18 postpetition interest. The settlement agreement is silent  
19 about interest.

20 So consistent with that line of --

21 THE COURT: The fiduciary duty on the part of the  
22 plan administrator to pay all allowed claims in full, their  
23 full entitlements to distributions under the plan, and in  
24 order to discharge that fiduciary duty the plan  
25 administrator has to know what people are expecting so that

1 it can reserve appropriately, make distributions, and close  
2 out the case. There's nothing tricky or surprising about  
3 the plan administrator seeking to know. In fact the  
4 statistics that were quoted by Mr. Fail demonstrate that you  
5 folks are outliers -- outliers in making demands that you  
6 have.

7 So it's not enough apparently to being paid in  
8 full and to have the concession that you're entitled to the  
9 federal judgment rate. Instead you're inviting me on a  
10 frolic and detour into English law.

11 MR. GLICKMAN: Well in fairness, Your Honor,  
12 initially the whole English law issue and the statutory rate  
13 issue was not an issue in this case. Initially when the  
14 plan administrator submitted its objection it was prepared  
15 to assume that the GCCM applied, it didn't make any of these  
16 arguments, Your Honor.

17 THE COURT: And what am I supposed to do with that  
18 alleged --

19 MR. GLICKMAN: I agree it's not binding.

20 THE COURT: What am I supposed to do with that  
21 alleged fact? Are you suggesting that --

22 MR. GLICKMAN: No.

23 THE COURT: -- first of all Mr. Fail disputes your  
24 characterization, he just stood up here and told me that  
25 your characterization of those previous arguments is

1 inaccurate, that those were assuming arguendo.

2 Secondly, I don't understand what I'm supposed to  
3 do with the facts surrounding the prior objection. The plan  
4 administrator is standing here today before me and making an  
5 argument.

6 MR. GLICKMAN: Understood, Your Honor. Your Honor  
7 asked why is it that we're now going on this, what Your  
8 Honor described as a frolic and detour, with respect to  
9 settlement agreement. It was never previously in the case.  
10 I agree it's in the case now, the plan administrator has  
11 ever right to change its mind and put in the new argument,  
12 my only point was we didn't bring this issue up, we didn't  
13 discuss it initially because it wasn't raised initially.  
14 The whole English law issue didn't come up initially because  
15 the plan administrator wasn't arguing for the statutory  
16 rate. Now that the plan administrator has switched to  
17 arguing for the statutory rate it has every right to do  
18 that, I agree. It has every right to do that.

19 But if you take its new argument to the logical  
20 conclusion you have a settlement agreement, let's interpret  
21 it like a contract, and I'll try to present why it makes no  
22 sense.

23 THE COURT: You don't think a settlement agreement  
24 is a contract?

25 MR. GLICKMAN: I think it's a contract that deals

1 with the subject matter that was at issue, and I think that  
2 you have to look beyond the language as a practical matter,  
3 because all contracts have to be interpreted sensibly and  
4 reasonably, you have to look at what was being negotiated.

5 But let's take their approach and let's read the  
6 settlement agreement like a contract that governs everything  
7 between the parties. Let's see where that takes us. We  
8 read it, it says nothing about interest. So we don't get  
9 interest. It says it makes -- it's settling the dispute  
10 between us --

11 THE COURT: It's giving you an allowed claim and  
12 then you take that allowed claim and you present it to the  
13 plan administrator for payment pursuant to the plan. The  
14 plan provisions govern the entitlement to a certain  
15 distribution and any interest entitlement thereon. In a  
16 solvent case you get postpetition interest. No one is  
17 disputing that.

18 In this settlement agreement had you thought about  
19 it, which of course you didn't because you weren't the  
20 holder of the claim then, you -- there could have been a  
21 negotiation specifically around an interest rate. There  
22 wasn't.

23 MR. GLICKMAN: It was premature to do that at that  
24 stage, Your Honor, because that wasn't the subject matter of  
25 what was being negotiated. And I would submit what they're

1 trying to do --

2 THE COURT: But again, I'm not going to take up an  
3 invitation to engage in a discussion about something that  
4 could be interpreted as resolving a disputed issue of fact.  
5 You just said that wasn't what it was about.

6 The settlement agreement stands. It is a court-  
7 approved settlement agreement. Its language is clear, it  
8 was ordered by the Court, period. I'm not going get into a  
9 discussion of what was on the table --

10 MR. GLICKMAN: Agreed.

11 THE COURT: -- or recognize any ambiguity  
12 whatsoever in the language of the settlement agreement or in  
13 the language or the order approving it.

14 MR. GLICKMAN: Your Honor, I'm not trying to  
15 suggest that there's a factual question of what the parties  
16 had on their mind. I'm saying as a matter of law what was  
17 on the table at that stage was the claim and not the  
18 interest.

19 THE COURT: You just did exactly what you said you  
20 weren't going to do. You're saying as a matter of law what  
21 was on the table was the claim and not the interest rate.

22 MR. GLICKMAN: Because at that stage of the  
23 proceedings one isn't dealing with the interest. I'm not  
24 suggesting that the Court refer to some question of fact of  
25 what the people were negotiating and so forth, but the

1 purpose of the settlement agreement was to resolve the  
2 claim.

3 THE COURT: That's a -- you are stating a fact to  
4 me. That is a fact.

5 MR. GLICKMAN: But --

6 THE COURT: That the purpose of the settlement  
7 agreement was more narrow than you would have it be --

8 MR. GLICKMAN: I'm not --

9 THE COURT: -- than the plan administrator would  
10 have it be. That's a fact to me --

11 MR. GLICKMAN: I'm not --

12 THE COURT: -- and I am declining to agree with  
13 you. I'm not going to meet you on that dispute, because I  
14 am not going to create an issue of fact.

15 The settlement agreement speaks for itself, it's  
16 clear and unambiguous. Any statement that you make about  
17 the purpose of the settlement or the scope of what was  
18 settled is not on the table.

19 MR. GLICKMAN: Your Honor, my argument that it  
20 simply dealt with the claim is just based on what the  
21 function was -- not a factual issue, I am not trying to say  
22 it on the record, I'm not trying to suggest there's a  
23 factual issue, I'm not trying to create a factual issue --  
24 I'm saying as a matter of the express terms of the agreement  
25 and its function it was only to resolve the claim. And I

1 would say that what they're trying to do in terms of having  
2 an impact on interest is to use it selectively. They're  
3 saying it doesn't wipe out the whole postpetition interest  
4 process, but it should be read back on the plan to eliminate  
5 the contract that's referenced there as a potential basis  
6 for the interest.

7 So they're saying on the one hand it doesn't speak  
8 to interest, because it preserves the whole postpetition  
9 interest process, but on the other hand they're saying, well  
10 actually it does, because when you go back and read the plan  
11 to determine the postpetition interest you have to read out  
12 the word contract because the old contract is gone.

13 So they're saying it partly reads on postpetition  
14 interest and partly doesn't.

15 Our position --

16 THE COURT: No, they're saying that you're saying  
17 that you selectively want to continue in existence parts of  
18 the pre-settlement agreement contracts that may or may not  
19 have been implicated, and the settlement agreement itself  
20 says whatever was out there is no longer -- no longer  
21 pertains.

22 MR. GLICKMAN: And our response to that, just to  
23 be clear, is that yes, there's very broad language there,  
24 but the four corners of what the settlement agreement was  
25 doing was dealing with the claim and not the postpetition

1 interest. And maybe never (indiscernible), Your Honor, I  
2 mean that -- we're not disputing the breadth of the  
3 language, we're not disputing that it was --

4 THE COURT: Yes, you -- I'm sorry, I don't mean to  
5 be so frustrated, but you are exactly doing that. You say  
6 you're not, but then literally in the next breath you're  
7 saying that this language was not intended to go beyond the  
8 scope of the claim when the language itself says everything  
9 else is off the table.

10 So I hear you trying hard not to argue with me,  
11 and I appreciate that, but you're contradicting yourself  
12 from one sentence to the next.

13 MR. GLICKMAN: Well, Your Honor, what I'm saying  
14 is that there are very broad terms in there and that they  
15 wipe away everything, but our position is that everything is  
16 with respect to the claim alone. And yes, Your Honor, in  
17 that sense it's limited.

18 THE COURT: So a settlement agreement -- so I need  
19 to go back to all the settlement agreements that I've  
20 approved in this case and that Judge Peck approved before me  
21 and figure out what implication there is to is it just the  
22 claim or is does it somehow impact the distribution?

23 This is a settlement agreement that gave the  
24 holders of the -- that gave the parties who filed the proofs  
25 of claim an allowed claim.



1 MR. GLICKMAN: Understood, Your Honor. I think  
2 it's simpler than that. I think Your Honor doesn't have to  
3 go back to all those settlement agreements, it's simply a  
4 question of concluding that a settlement doesn't become the  
5 contract for purposes of postpetition interest. That's all.  
6 It doesn't mean you have go back and revisit everything  
7 else.

8 THE COURT: And what's your authority for that  
9 position?

10 MR. GLICKMAN: My authority for that provision is  
11 that -- position is that every contract has to be construed  
12 sensibly with respect to what it's about, and we have a  
13 contract here that resolved the claim, there's an entirely  
14 separate proceeding with respect to postpetition interest  
15 that the settlement agreement wasn't about, that's not a  
16 factual question, that's what it talks about, it's this is  
17 the amount of the claim. It doesn't say a word about  
18 interest. And to take their argument to a logical  
19 conclusion that means there's no interest, but nobody is  
20 assuming that.

21 THE COURT: What about the language that says that  
22 all prior agreements -- any contract predating the  
23 settlement is of no force and effect? What about that?

24 MR. GLICKMAN: So that would eliminate contracts  
25 that my client has with other businesses. If you want to

1 read that language as applying to every contract in the  
2 world on the face of it, Your Honor, that language would  
3 apply to every contract in the world.

4 THE COURT: That's silly.

5 MR. GLICKMAN: It can't -- I agree with you, it is  
6 silly.

7 THE COURT: You just got done telling me that you  
8 have to read contractual language in the context. So in the  
9 context of this settlement when there's a reference to  
10 contracts predating the settlement --

11 MR. GLICKMAN: Right.

12 THE COURT: -- I think we can agree, non-  
13 ridiculously, that we're not trying to -- that the two  
14 parties to the settlement agreement are not somehow trying  
15 to render contracts that have --

16 MR. GLICKMAN: Of course not.

17 THE COURT: Of course not, because there's  
18 context.

19 So the context is that any contracts that may have  
20 existed or may have pertained to the subject matter that is  
21 the subject of the settlement agreement are of no force and  
22 effect.

23 MR. GLICKMAN: Agreed.

24 THE COURT: Okay.

25 MR. GLICKMAN: Your Honor just said there's

1 context and any contracts that relate to the subject matter  
2 of the agreement. Our argument is an intellectually  
3 coherent argument, which is the context here was the claim,  
4 not postpetition interest. Yes, it's very broad language.  
5 Anything that has to do with the claim gone, good-bye.

6 THE COURT: No, but now you're flipping back to  
7 the other language.

8 MR. GLICKMAN: No, I'm --

9 THE COURT: The settlement agreement says that any  
10 contract predating the settlement is of no force and effect.

11 MR. GLICKMAN: In that -- in the context of what  
12 the settlement agreement was doing, Your Honor. The  
13 settlement agreement was resolving the claim, not the  
14 postpetition interest. So yes, every contract that has to  
15 do with the underlying claim gone, good-bye. Not with  
16 respect to postpetition interest. It's not an unreasonable  
17 position, Your Honor. Once we accept the notion that  
18 context matters, and that's what contract interpretation is  
19 all about. That's the entirety of our position.

20 We're not waving our hand and saying, oh, it's  
21 just boilerplate, it wasn't put in there for no -- no any  
22 reason. Of course it was put in there for a reason, and of  
23 course it has force and effect, but the force and effect is  
24 on the claim, not the postpetition interest. That's our  
25 position pure is simple. And I don't think it's -- it's

1 position that is reasonable, because that's the context.

2 And if you want to say you're going to take those  
3 words and divorce them from any context then you get into  
4 ridiculous language, as Your Honor was saying, and it could  
5 apply to anything.

6 So that's our position on the settlement  
7 agreement.

8 Now they raise a number of other arguments, shall  
9 I address them?

10 THE COURT: Up to you.

11 MR. GLICKMAN: Well I'd like to if it could.

12 THE COURT: Go ahead. Sure.

13 MR. GLICKMAN: Because I mean in fairness to them  
14 they have a number of alternative arguments. So if the  
15 settlement agreement argument doesn't work for them --

16 THE COURT: Is the settlement agreement a  
17 contract?

18 MR. GLICKMAN: Yes, it's a contract, Your Honor.

19 THE COURT: Okay.

20 MR. GLICKMAN: The settlement agreement is a  
21 contract, it's not the contract on which the claims for  
22 interest is based. That's our position. Of course it's a  
23 contract. I agree with that. Not --

24 THE COURT: The claim for interest is based on the  
25 allowed claim, correct? The claim for interest is premised

1 on the allowed claim.

2 MR. GLICKMAN: It's premised on there having been  
3 an allowed claim.

4 THE COURT: There's an allowed claim.

5 MR. GLICKMAN: Correct.

6 THE COURT: You've presented that to the plan  
7 administrator and said please pay me postpetition interest.  
8 The plan administrator is going to calculate the amount of  
9 the postpetition interest based on the number of your  
10 allowed claim, right?

11 MR. GLICKMAN: Correct.

12 THE COURT: Okay. And what gives you that allowed  
13 claim? The settlement agreement, the contract that the  
14 parties made about what the allowed amount of the claim  
15 would be, and then like every other party in this case you  
16 take that allowed claim and you get paid a distribution  
17 pursuant to the provisions of the plan.

18 MR. GLICKMAN: We're not disagreeing with that,  
19 Your Honor. What we're saying is that when they drafted the  
20 plan and they wanted to give the parties the benefit of  
21 their bargain when they put in there that postpetition  
22 interest can be based on the contractual rate that the  
23 parties agreed to, they weren't thinking about a settlement  
24 agreement --

25 THE COURT: But now we're getting into what they

1 were thinking about when they drafted the plan.

2 MR. GLICKMAN: I'm speaking colloquially, Your  
3 Honor. I mean I'm just saying a common sense --

4 THE COURT: Okay. I just want to be very clear --

5 MR. GLICKMAN: I'm not raising a factual issue.

6 THE COURT: Well I suspect that if I don't rule in  
7 your favor you will tell the district court that I resolved  
8 factual issues.

9 MR. GLICKMAN: I will not tell the district court  
10 that.

11 THE COURT: So I just want -- I'm just --

12 MR. GLICKMAN: Your Honor, I'm going to say on the  
13 record --

14 THE COURT: -- trying to be very clear --

15 MR. GLICKMAN: I'm going to say on the record --  
16 but we don't have to go there. I will not tell the district  
17 court that you're resolving a factual issue.

18 THE COURT: I don't want to -- I --

19 MR. GLICKMAN: No. This is --

20 THE COURT: You have every right --

21 MR. GLICKMAN: I know.

22 THE COURT: -- to make whatever argument that you  
23 want.

24 MR. GLICKMAN: I know that, but I'm not going  
25 there. I'm not going there. It's a legal argument that

1 settlement agreements ,and there could be other instances  
2 here, and this plan reads like a lot of other plans. You're  
3 going to be making a policy decision, Judge, here, which is  
4 when a plan says a contract when referring to postpetition  
5 interest does that mean if there's a settlement agreement  
6 whatever contract there was goes away? It's a legal  
7 conclusion.

8 THE COURT: It's not a policy argument.

9 MR. GLICKMAN: Well it's --

10 THE COURT: It's a legal --

11 MR. GLICKMAN: It's a legal issue that's informed  
12 by policy, right?

13 THE COURT: I --

14 MR. GLICKMAN: Because it's going to have  
15 implications for other cases.

16 THE COURT: I decline to agree with you.

17 MR. GLICKMAN: Okay.

18 THE COURT: Okay?

19 MR. GLICKMAN: So just in terms of managing --

20 THE COURT: Let the record reflect I'm saying that  
21 with a smile, okay?

22 MR. GLICKMAN: Okay. I understand.

23 So just in terms of process here. I don't want to  
24 take up the Court's time, but --

25 THE COURT: You can have as much time as you like.

1 MR. GLICKMAN: Well here's what I don't want to  
2 do, and if Your Honor -- if there's any chance in the world  
3 that Your Honor might consider the other issues I think I  
4 need to address them.

5 THE COURT: Of course.

6 MR. GLICKMAN: Their alternative arguments.

7 THE COURT: Go ahead.

8 MR. DORCHAK: Your Honor, may -- I'm sorry to  
9 interrupt, Joshua Dorchak on behalf of Chase Lincoln First  
10 Commercial Corporation. I'd just like to add a couple of  
11 points on the settlement issue.

12 MR. GLICKMAN: They've already been discussed and  
13 then maybe we can get that topic over with?

14 THE COURT: Sure.

15 MR. GLICKMAN: So as not to --

16 THE COURT: If your --

17 MR. GLICKMAN: It's a settlement issue.

18 THE COURT: -- learned colleague will concede the  
19 -- will yield the podium then --

20 MR. GLICKMAN: Temporarily. I'm willing to let  
21 something else take a crack at this settlement agreement  
22 issue.

23 THE COURT: Go ahead. Okay.

24 MR. DORCHAK: Thank you, Your Honor. Again,  
25 Joshua Dorchak --



1 THE COURT: Yep.

2 MR. DORCHAK: -- of Morgan Lewis on behalf of  
3 Chase Lincoln First Commercial Corporation.

4 So I have a couple -- well mainly a legal point  
5 I'd like to make, which Mr. Glickman didn't quite say,  
6 although in effect I think he was saying that.

7 It seems to me the settlement agreement settled  
8 the issue of the proper allowed amount, the agreed  
9 crystallized amount, of a proof of claim that was filed  
10 under Section 501 of the Bankruptcy Code, and that would be  
11 allowed under Section 502 of Bankruptcy Code.

12 The entitlement to the distributions on that  
13 allowed claim come through a plan. We all agree on that.  
14 There's no more dispute once the settlement agreement is  
15 signed and the order is approving it as entered, if there  
16 was one, no more dispute about the allowed amount of the  
17 claim under Section 502. That's done.

18 But the entitlement to postpetition interest  
19 doesn't come through Section 502, it's not in the proof of  
20 claim. Arguably it's improper to include a demand for  
21 postpetition interest from a solvent debtor if you're  
22 unsecured in your proof of claim, because your entitlement  
23 --

24 THE COURT: The law gives you the entitlement and  
25 the plan --

1 MR. DORCHAK: Yep.

2 THE COURT: -- and the plan reflects how that  
3 entitlement is going to be taken care of.

4 MR. DORCHAK: Sure. And the plan here says -- as  
5 a result of negotiations says this thing about contractual  
6 rate, if there is one, as opposed to legal rate or fixed  
7 rate or statutory rate or whatever.

8 THE COURT: Uh-huh.

9 MR. DORCHAK: So that was something negotiated  
10 into the plan. So that's why we have the -- we don't have a  
11 contract versus statutory issue here, because --

12 THE COURT: Uh-huh.

13 MR. DORCHAK: -- we have a -- the question is  
14 whether we have a contract. The contract that they point to  
15 is the only contract that matters here, it's the settlement  
16 agreement.

17 My argument here from a legal perspective is that  
18 the settlement agreement settled the claim and gave it an  
19 allowed amount under Section 502 and that the entitlement to  
20 postpetition interest, which is running from Section 702(a)  
21 of the Bankruptcy Code -- not from 502 -- because it's  
22 unlike an oversecured claim where the postpetition interest  
23 is baked into the amount of the claims, the statute saying  
24 that -- this is different. You've got an allowed claim and  
25 then if you're lucky enough to have a solvent debtor some

1 day then Section 726(a) gives you --

2 THE COURT: Right.

3 MR. DORCHAK: -- our postpetition interest.

4 So what these folks were settling was a  
5 prepetition claim evidenced by a proof of claim and then  
6 resolved under Section 501 and Section 502. This --  
7 anything in that universe is resolved. Any contract that  
8 goes to the merits, goes to the amount of that claim that's  
9 allowed under Section 502 and will get distributions some  
10 day --

11 THE COURT: Except contract gone, totally settled,  
12 except for those little provisions that say interest rate to  
13 be determined X, Y, or Z. That's your position. Is that  
14 that whole contract we're done with it except we get to keep  
15 this one little piece because it pays us a whole boatload  
16 more interest than what the plan says.

17 MR. DORCHAK: We get to keep that piece, Your  
18 Honor, because the plan says and when it comes to the  
19 Section 726 inquire you're going to look at the contract  
20 that underlies the claim. This can't mean the settlement  
21 agreement whereby the 502 claim --

22 THE COURT: Why not?

23 MR. DORCHAK: -- is crystallized.

24 THE COURT: Why not?

25 MR. DORCHAK: Because if that were the case then

1 this -- I don't think there would be a single claim in this  
2 case for postpetition interest that would be governed by a  
3 contract, because all the claims against the solvent debtors  
4 were settled as far as I know -- virtually all of them --  
5 there were some settlement agreements that express finality  
6 and superseding prior agreements and termination of pending  
7 agreements and different words, but all have the same  
8 effect, we're done here, everything is over, this is  
9 everything. And if those settlement agreements, which don't  
10 give interest rates because they're not about postpetition  
11 interest, they're about prepetition claims, if those are the  
12 claims -- if those are the contracts on which all of those  
13 settled allowed Section 502 claims are based and those  
14 claims are no longer based on what they were originally  
15 based on --

16 THE COURT: Well I'm even more confused than I was  
17 before.

18 So your idea is that in a case -- in a solvent  
19 case claims that are based on or reflected in settlement  
20 agreements, allowed claims that come into existence that  
21 become allowed via settlement agreements --

22 MR. DORCHAK: They existed before, they were --  
23 they became allowed pursuant to the settlement agreements.

24 THE COURT: Proof of claim gets filed.

25 MR. DORCHAK: Yep.

1 THE COURT: It gets -- a claim then becomes  
2 allowed in the bankruptcy sense either because the debtor  
3 doesn't object to it or they negotiate a settled claim  
4 amount or there's a litigated claim amount, and then there's  
5 an allowed claim, which gets presented for payment.

6 MR. DORCHAK: Right.

7 THE COURT: Right?

8 MR. DORCHAK: Right.

9 THE COURT: So that if there is an allowed claim,  
10 for example, incident to somebody sold LBCC widgets, right,  
11 and they file a proof of claim for a million dollars of  
12 widgets and LBCC says, no, that's not right, it's \$900,000  
13 of widgets, right?

14 MR. DORCHAK: Okay.

15 THE COURT: And the claim gets allowed in the  
16 amount of \$900,000 of widgets. And in the contract, the  
17 widget contract, it says the contractual interest rate is  
18 ten percent.

19 MR. DORCHAK: Okay.

20 THE COURT: Okay? I'll ask Mr. Fail, okay, what  
21 interest rate are you going to pay on that claim?

22 MR. FAIL: If the language had -- if the  
23 settlement agreement --

24 THE COURT: There's no settlement agreement.

25 MR. FAIL: Oh, ten percent, Your Honor.

1 THE COURT: You don't have that. You have a  
2 settlement agreement.

3 MR. DORCHAK: Like 99 percent of the claimants in  
4 these cases, Your Honor. We have a --

5 THE COURT: So are you suggesting --

6 MR. DORCHAK: -- either a settlement agreement --

7 THE COURT: Are you --

8 MR. DORCHAK: -- or sometimes a reducing and  
9 allower, right? But when there was a negotiation of a  
10 settlement agreement, which on its face purports --

11 THE COURT: Right. So you're saying when there's  
12 a settlement agreement, because for whatever set of reasons  
13 procedurally there needs to be a settlement agreement or the  
14 parties want a settlement agreement, that the contract for  
15 purposes of postpetition interest survives.

16 MR. DORCHAK: Yes. The contract on which the  
17 claim is based in my view is always the original transaction  
18 documents. They -- their effect going forward is terminated  
19 by the settlement agreement, the settlement agreement  
20 supersedes the prior contractual prepetition relationship  
21 documentation because we're not worried about those details  
22 anymore, we've resolved that. That prepetition  
23 relationship, which had contracts on which it was based,  
24 turned into an allowed claim, the claim was allowed pursuant  
25 to a settlement, but --

1 THE COURT: Okay. So let me --

2 MR. DORCHAK: -- to say that the claim is based on  
3 the settlement agreement --

4 THE COURT: Okay. I'll agree with you. Then  
5 what's the point of the provision in the settlement  
6 agreement --

7 MR. DORCHAK: Uh-huh.

8 THE COURT: -- we're all at the table --

9 MR. DORCHAK: Yes.

10 THE COURT: -- we're settling.

11 MR. DORCHAK: Yes.

12 THE COURT: Okay. Everybody is agreeing and  
13 they're saying to each other we're settling the claim but  
14 not the right to prepetition interest, oh, wait there's  
15 language in here that saying that the contract is of no  
16 force and effect. What does that mean? Is that just like  
17 an inside lawyer's joke?

18 MR. DORCHAK: No, it's not a joke. This is --

19 THE COURT: Every --

20 MR. DORCHAK: -- none of this is a joke, Your  
21 Honor.

22 THE COURT: No, it's not, because words have  
23 meaning. So when you sit down and you sign a settlement  
24 agreement and you present it to a court for approval and the  
25 settlement agreement itself says that any contract predating

1 that relates to the claim is of no force and effect what  
2 could be clearer? It doesn't say provided however that the  
3 provisions in the contract relating to the entitlement to  
4 interest shall survive.

5 MR. DORCHAK: Right.

6 THE COURT: It doesn't say that.

7 MR. DORCHAK: Right. And we're not going to talk  
8 about facts today, Your Honor, so we're not going to talk  
9 about the fact that nobody at the time this settlement was  
10 entered into had any expectation that LBCC would ever be  
11 solvent, so that's the reason why it's not addressed.

12 But what I would respond more directly to the --

13 THE COURT: Lawyers are pretty good at covering  
14 their bases, but I'm not going to go -- as I said before I'm  
15 not going to go into any such facts.

16 MR. DORCHAK: Right.

17 THE COURT: I think they're irrelevant and --

18 MR. DORCHAK: I'm trying to stick to the law here,  
19 Your Honor. But there's a -- to refer -- sorry --

20 THE COURT: Speak up a bit, we're having a hard  
21 time -- your soft spoken.

22 MR. DORCHAK: Sorry. This happens to me.

23 THE COURT: I know that from past experience.

24 MR. DORCHAK: All right. I'll try to be more  
25 aggressive.



1           So, Your Honor, to address the point you just made  
2           about the prior agreements being superseded by the  
3           settlement agreement, to me that's the same as the classic  
4           termination agreement whereby the debtors settled derivative  
5           claims -- close out derivative claims here. The rule  
6           clearly saying to the extent that the prior agreements  
7           weren't terminated already they are terminated hereby,  
8           right? So that's a way of saying --

9           THE COURT: Terminated --

10          MR. DORCHAK: -- we're not parties to a  
11          derivatives contract anymore.

12          THE COURT: I understand. But terminated --

13          MR. DORCHAK: Uh-huh.

14          THE COURT: -- is not -- does not mean the same  
15          thing as of no force and effect.

16          We all know from our time in the world of ISDAs,  
17          that contract transactions can be terminated and certain  
18          provisions remain in full force and effect. Here you have a  
19          settlement agreement that specifically says --

20          MR. DORCHAK: It's --

21          THE COURT: -- no force and effect.

22          MR. DORCHAK: -- there's a lot of language in this  
23          agreement. The way we -- we're not calling it boilerplate,  
24          Your Honor, I agree, because that doesn't (indiscernible)  
25          walk away at that point.

1 THE COURT: Okay, good.

2 MR. DORCHAK: Understood. I'm not complaining  
3 about it because it's boilerplate. I'm saying that the  
4 elaborate language in there, which again not to go into  
5 facts, is because this is actually a sort of a triangle with  
6 LBIE and LBCC and the Lehman Re and other ones, trying to  
7 make sure nobody pops up after this settlement and says,  
8 hang on a second, I forgot something, you know, you ran over  
9 my dog. So the attempt to be complete and thorough is  
10 absolutely there.

11 But we're being thorough is complete about, drum  
12 role, an allowed claim under Section 502, and we're not  
13 being thorough and complete about this thing that isn't even  
14 on the table, which I agree with Mr. Glickman, but from a  
15 more Bankruptcy Code-based perspective, which is this  
16 distinction between 502 and 726, and then I added the  
17 practical thing, which again is merely a factual issue, but  
18 it's hard to believe that that phrase in Section 8.13(c) of  
19 the plan that says that people who are lucky enough to have  
20 solvent debtors will get postpetition interest based on a --  
21 pursuant to the contract on which the claim is based. That  
22 actually refers to a settlement agreement, any time there's  
23 a settlement agreement. That blew my mind when they made  
24 that argument. I can't believe anybody thinks that's true.  
25 Because as I said before, that would sort of nullify the

1 effect of the -- everything, almost everything has been  
2 settled by a settlement agreement in this case.

3 So -- and the debtors have paid out postpetition  
4 interest to claim holders of other solvent estates where  
5 there was a settlement agreement to resolve the claim and  
6 they didn't jump up and say we don't owe you anything  
7 because the contract on which your claim is based is the  
8 settlement agreement, we just entered into last week, ha ha.  
9 They didn't do that with everybody else.

10 So I know you said we're outliers and we're  
11 exceptional, but actually we're just -- we're -- we want  
12 what everybody else got.

13 Now admittedly they settled, but that doesn't mean  
14 they didn't get any postpetition interest because ha ha on  
15 them they signed a settlement agreement.

16 THE COURT: They're not -- the plan administrator  
17 is agreeing with you that you have an entitlement to  
18 postpetition interest at the -- pursuant to the plan,  
19 pursuant to what the plan says.

20 MR. DORCHAK: They can't argue we don't have that,  
21 Your Honor, but then they want to take the value away from  
22 us. They're trying to minimize the value. We can all see  
23 that, that's their job you could argue, right, and it's our  
24 job to argue for our rights within --

25 THE COURT: Did you --

1 MR. DORCHAK: -- in the realm of what's reasonable  
2 and ethical and so on, which I think we're well within that.

3 THE COURT: When did you acquire the claim?

4 MR. DORCHAK: I don't remember the year in which  
5 the claim was acquired, Your Honor. I'm sorry, I just --

6 THE COURT: Okay.

7 MR. DORCHAK: -- didn't want to get into facts,  
8 you know.

9 Okay. So just to add the legal layer, Your Honor,  
10 to the discussion, which I totally took your point, but I  
11 agree for separate legal actions. Thank you very much.

12 THE COURT: Okay. Thank you.

13 MR. FAIL: Your Honor, just one very, very  
14 briefly, if I may.

15 THE COURT: Yeah.

16 MR. FAIL: For the record Garrett Fail for the  
17 debtors.

18 Your Honor, you've articulated our points and seem  
19 to understand them clearly. A couple of rebuttal points.

20 First and foremost it's not the plan  
21 administrator's job to give as little out as possible, it's  
22 maximizing value, and just today distributed over \$3 billion  
23 to creditors.

24 We're here to give the entitlement to those who  
25 are entitled -- to whom it's entitled and we're doing that.

1           The second there was talk about who was at a table  
2           and what's factual. The only fact that is clear and  
3           undisputed is that the plan was on file before the  
4           settlement agreement was entered into, and the plan was  
5           confirmed before the Court entered the order approving the  
6           settlement agreement with the language.

7           THE COURT: So --

8           MR. FAIL: Just in terms of timing that's --

9           THE COURT: -- the plan was -- I'm trying to  
10          remember now -- the plan was confirmed in March of 2012?

11          MR. FAIL: It became effective on March 6th --

12          THE COURT: It became --

13          MR. FAIL: -- but it was confirmed December 6th or  
14          December 12th of --

15          THE COURT: Of 2011.

16          MR. FAIL: -- 2011.

17          THE COURT: It went effective in 2012, the  
18          settlement agreement was in --

19          MR. FAIL: After that in 2012. March of 2012.

20          THE COURT: Okay. And I believe that these -- at  
21          least one of these claimants acquired the claim in 2013.

22          MR. FAIL: All subsequent. We settled with Lehman  
23          Re.

24          THE COURT: All subsequent.

25          MR. FAIL: We settled with Lehman Re. Lehman Re

1 consently sold claims.

2 THE COURT: So the notion of even thinking about  
3 who was thinking about what --

4 MR. FAIL: Only the plan administrator was in the  
5 room, only LBHI was in the room, and were LBCC and the  
6 debtors, but no holder was in the room. But we're not  
7 talking about facts.

8 THE COURT: Right.

9 MR. FAIL: The only fact is just timing wise if  
10 people are suggesting that somehow the plan --

11 THE COURT: I think what Mr. --

12 MR. FAIL: -- the plan overrides those subsequent  
13 settlement --

14 THE COURT: I think what's being suggested is that  
15 these folks are being singled out for disparate treatment  
16 that in other instances in which there was a settlement  
17 agreement that postpetition interest was being paid at a  
18 contractual rate reflected in a contract that existed  
19 between the parties and that was resolved pursuant to a  
20 settlement agreement.

21 MR. FAIL: Okay. Other claims and other issues  
22 aren't before the Court today, so it's irrelevant to the  
23 contractual reading of the settlement agreement and the  
24 objection before the Court.

25 But, Your Honor, I don't think we need to get to

1 it, I think it's pretty clear where this is going. But, you  
2 know, our argument is that if they get the settlement  
3 agreement -- the only reason they're pushing that is because  
4 they want to fix a contractual rate and cherry pick a rate  
5 to fix it at the petition date and to increase it by 28  
6 times. We think there's a million dollars of damages. So  
7 if the Court were to rule that the language that they're  
8 seeking LIBOR flat reset daily, or you know --

9 THE COURT: Uh-huh.

10 MR. FAIL: -- you can't delete those words either.  
11 So if that's the answer and it's a million dollars that's  
12 fine too.

13 But I don't see how you can come to a conclusion  
14 that if it is the GCCM or the draft that's what's -- you  
15 know, assume arguendo that's what it is, how do you  
16 eliminate those words? How do you drop out reset daily and  
17 fix it? There's no basis whatsoever. They're going to cite  
18 Dow as one case that did and then there's of course a 15-  
19 year-old case from Michigan, and then as it went up they  
20 were like, yeah, it could have gone either way, I guess it's  
21 not an abuse of discretion. We would recommend that that's  
22 not the standard to strive for for a clear reading or an  
23 appropriate way to go.

24 So, you know, the GCCM or the draft is relevant,  
25 it's a million dollars of interest to spread amongst the

1 holders.

2 THE COURT: Thank you.

3 MR. GLICKMAN: I've been trying to think about how  
4 we can streamline this and just sort of abort the orders of  
5 the issues at this point. There's a couple of other issues  
6 which is assuming that the GCCM does apply, and I guess  
7 they've reserved that as kind of a factual issue that  
8 they're assuming arguendo for purposes of this hearing.

9 THE COURT: That it does apply.

10 MR. GLICKMAN: They're willing to assume that it  
11 did apply, but they're saying the settlement wipes it away.

12 THE COURT: Yes.

13 MR. GLICKMAN: Right. So if the settlement  
14 doesn't wipe it away --

15 THE COURT: Right.

16 MR. GLICKMAN: -- then the question is what do we  
17 do about the GCCM and then --

18 THE COURT: Yes.

19 MR. GLICKMAN: -- we'll be back here  
20 (indiscernible). Since they're assuming it arguendo for  
21 purposes of today --

22 THE COURT: Right.

23 MR. GLICKMAN: -- all I would say is that we think  
24 the evidence that's in there already, that we've proffered  
25 already, they haven't proffered anything. They didn't have



1 to. But we think the evidence that's in there already makes  
2 clear how the GCCM works --

3 THE COURT: I'm sorry, but --

4 MR. GLICKMAN: Okay, sorry.

5 THE COURT: -- this is a sufficiency hearing.

6 MR. GLICKMAN: Right. I agree. I agree.

7 THE COURT: Right.

8 MR. GLICKMAN: I'm just looking ahead in the event  
9 that Your Honor doesn't rule that the settlement agreement  
10 wipes everything away. Then the question is where are we?  
11 What's the next question on the list?

12 THE COURT: Right.

13 MR. GLICKMAN: So the next question on the list is  
14 okay, so the GCCM is alive and well. What is it? How does  
15 it work? So we say it's the system that managed interest as  
16 between Lehman entities and it provided for interest at the  
17 rate of one week (indiscernible). They're saying assume  
18 that arguendo. Right? So what I'm saying is looking ahead,  
19 we can either come back and say based on the evidence we've  
20 put in, and if they don't proffer anything else, the Court  
21 can find that. Or we would ask for very, very limited  
22 discovery, just documents sufficient to show how the system  
23 works. But that would be for a future date. And I don't  
24 want to kind of debate how much better what we've proffered  
25 about what it means is -- than what they've proffered

1 because they haven't proffered anything --

2 THE COURT: It's a sufficiency hearing.

3 MR. GLICKMAN: Agreed. Okay. So just a couple of  
4 other -- and whether -- just to tick off everything in an  
5 organized way, another issue that's out there is assuming  
6 the GCCM applies and provides for one week labor, is it  
7 British labor or is it U.S. labor. That we can hold for  
8 another day as necessary.

9 So by my count there's two issues left and we  
10 should just make a judgment about what we need to reach  
11 today and what we don't. So one is contingent on the GCCM  
12 applying. If the GCCM applies, is its floating rate fixed  
13 as of the petition date? That's the Dow case. That's a  
14 significant legal issue and it's been briefed extensively.  
15 It's an important legal issue. The question is would you  
16 like me to address it today? It is operable of the GCCM  
17 applies. Your Honor could decide let's see. Let me make my  
18 decision about the settlement agreement. Let's see what the  
19 GCCM says. If it applies, then I will have to reach the  
20 question of whether it's fixed or floating.

21 Now, Garrett addressed that issue today. I can do  
22 it too. It's --

23 THE COURT: I don't want to cut off any argument  
24 that you want to make. I think you addressed it in your  
25 papers, though.

1 MR. GLICKMAN: We did address it in our papers,  
2 but they cut the last word in their reply and there are some  
3 things that I would want to flag but --

4 THE COURT: Go ahead.

5 MR. GLICKMAN: Okay. So their argument boils down  
6 to this. There's a floating rate in the GCCM. We agree  
7 with that. They say, okay, so it should keep floating post-  
8 petition, right? That's their argument, in essence. From  
9 our perspective, that doesn't answer whether it should. It  
10 just basically says it should. So it -- from our  
11 perspective it's not a question of picking and choosing  
12 parts of the GCCM. The question is does bankruptcy law, as  
13 a matter of law, operate to lock in the rate where it was as  
14 of the petition date. It's not a contract question. It's  
15 how does bankruptcy law operate and does it freeze things  
16 out of the petition date.

17 So what we argue is it's well-established in a  
18 number of other contexts that the petition date is the  
19 benchmark. And we've quoted cases that say the rights of  
20 creditors are fixed as of the filing of the petition date.  
21 And we've cited as an example --

22 THE COURT: You realize how intellectually  
23 inconsistent this argument is with the entirety of your  
24 earlier argument. That it's the contract right. It's the  
25 contract right. Look, here's this contract. This contract

1 says the rate floats, but the Bankruptcy Code says you fix  
2 it. So now you're saying that, but when you say you have an  
3 allowed claim and your entitlement -- you're entitled to  
4 something under the plan, right, that didn't work. There's  
5 a tremendous amount of picking and choosing in your  
6 arguments of what parts of the Bankruptcy Code, the case  
7 law, and the underlying documents are advantageous to you or  
8 not.

9 MR. GLICKMAN: How about this?

10 THE COURT: Sure.

11 MR. GLICKMAN: Okay. I will acknowledge that if  
12 the settlement agreement applied in terms of its scope, it  
13 could crush my GCCM, okay? I will acknowledge that, Your  
14 Honor, but it doesn't. And --

15 THE COURT: Okay. So your GCCM lives to fight  
16 another day.

17 MR. GLICKMAN: It lives to fight another day and  
18 that --

19 THE COURT: And now it says we float, right?

20 MR. GLICKMAN: It says we float.

21 THE COURT: It says we float. So now, that's the  
22 contract so that in -- we go to the Lehman plan and the  
23 Lehman plan says the contractual right. Okay, so I look at  
24 the contract and it says float. And you say no, no, no,  
25 don't float because, look, I've got this provision of the

1 Bankruptcy Code that says we're fixed on the petition date.

2 MR. GLICKMAN: Right. So I'll make your argument  
3 even better. You're saying look, you're saying contract,  
4 contract, contract. That contract says float and then when  
5 it comes to the petition date, you say I don't want my  
6 contract anymore.

7 THE COURT: No more floating, right.

8 MR. GLICKMAN: Right? That's the argument. It  
9 doesn't work. I promise it doesn't work and I'll walk  
10 through it. I get it. I get it. The case that I'll come  
11 to in a second, the Dow case, specifically considered that  
12 question. And what it said, as I'll come to, says when you  
13 come to the petition date, benefit of the bargain becomes  
14 only one issue. Another issue comes in which is  
15 compensating for delay. So let me draw to it if I can  
16 briefly, all right?

17 THE COURT: Okay.

18 MR. GLICKMAN: Our main analogy here is the  
19 federal judgment rate. So the federal judgment rate  
20 provides for a floating rate. It's the treasury. It  
21 floats. But the federal judgment statute says it's locked  
22 in as of the date of the judgment, right? And the  
23 Bankruptcy Courts say for purposes of bankruptcy law, the  
24 petition date is the date of judgment.

25 So we say, for the same reason that you lock in

1 the rate under the federal judgment rate as of the petition  
2 date, you should lock in the contract rate. It's part of  
3 the same sentence in the plan. It refers to the contract  
4 rate and the federal judgment rate. And it wouldn't make  
5 any sense to say, well, for the federal judgment rate, you  
6 stop letting it float as of the petition date, but for the  
7 contract rate, you keep letting it float.

8 Here's another example, exchange rates. They  
9 fluctuate all the time. Under the Bankruptcy Code, 502(b),  
10 they say stop the fluctuation. Translate it into dollars as  
11 of the petition date. So there's a lot of law for the  
12 proposition that the petition date matters to stop things in  
13 time. There's only one case that's ever considered that we  
14 can find whether a floating contract rate should be fixed as  
15 of the petition date. Only one. And it's the Dow case.  
16 And it's the one that was decided in March of 2004. That's  
17 in re -- there's a bunch of different Dow cases. But this  
18 is the District Court decision, just to make it clear. It's  
19 In re Dow Corning Corporation, case number 201-CV-71843,  
20 DPH, ECF number 36, Eastern District of Michigan, May 18th,  
21 2004.

22 In that case, the plan provided for post-petition  
23 interests at the contract rate. I don't know if there was a  
24 settlement agreement, but I'm going to go back and check  
25 because maybe we'll address that issue too. Here, the

1 contract rate is floating. It was floating there. They had  
2 the same argument, let the contract keep floating. That's  
3 what the debtor argued in that case. The Court explicitly  
4 rejected that argument at page 3 and said the contract rate  
5 of a contract with floating or variable rates is fixed and  
6 set at the specific rate in effect on the date of the filing  
7 of the petition for purposes of determining the pendency  
8 interest rate. Now, they say the Court gave no rationale.  
9 Not so, keep reading.

10 The case law supports the application of a set  
11 rate. More often than not, an interest rate set by statute,  
12 such as the federal judgment rate. So the Court itself is  
13 using a federal judgment rate as an analogy. So just slight  
14 detour.

15 In their reply for the first time they say there's  
16 another case out there that speaks to this issue, which is  
17 the Hahn case. Hahn v. GE Capital (ph). The Hahn case is  
18 not on point at all. No one was arguing about whether the  
19 rate should be fixed or not as of the petition date. The  
20 Court didn't consider that question. It didn't involve  
21 post-petition interests. The debtor was voluntarily paying  
22 interests post-petition. The creditor fixed the interest  
23 rate before the petition date on a contract basis. It's  
24 irrelevant. Let's go back to Dow.

25 They do everything they can to challenge its

1     persuasiveness, right? And so let's just -- and they make  
2     these arguments in their reply brief, which we haven't had a  
3     chance to respond to, so let me address them now. The first  
4     thing they say is, you know, the Dow Court acknowledged that  
5     the debtor made a "good argument." That's true, but the  
6     Court rejected it. They thought the better argument is that  
7     the rate should be fixed. It said Dow provided no  
8     rationale, but I just read you the rationale. It says,  
9     well, the Bankruptcy Court's written decision didn't address  
10    the issue, but actually the Bankruptcy Court below did  
11    address the issue orally and came out our way as well.

12             So they also say that on appeal, the Court found  
13    that the relevant phrase was ambiguous. And the only reason  
14    that it got favorable treatment on appeal was that the  
15    District Court was reviewed under abuse of discretion  
16    standard. It wasn't even reviewed on appeal, Your Honor.  
17    The issue that they're talking about had to do with default  
18    or non-default interest. The issue of whether it should be  
19    fixed or floating wasn't dealt with on appeal.

20             So then they get to the heart of the matter, which  
21    is you shouldn't use the federal judgment rate as an  
22    analogy. That's really the core of their position. And  
23    they say, look, you shouldn't do that because under the  
24    federal judgment rate, the rate is fixed pursuant to  
25    statutory language. That's why you fix the treasury rate as



1 of judgment because there's language in the statute that  
2 tells you to do that. And they say there's no such language  
3 here.

4 There's two problems with that argument, Your  
5 Honor. One is --

6 THE COURT: Well, but you know, when you actually  
7 read every bit of this case, which I frankly don't think we  
8 even get to, but for the purposes of engaging you in this  
9 argument. I'm listening. There are a number of other  
10 things that the Court says that are pretty interesting,  
11 okay? One of them is that the case law supports the  
12 application of a set rate more often than not an interest  
13 rates set by statute, such as the federal judgment rate.

14 MR. GLICKMAN: Yeah, that's -- right.

15 THE COURT: Moreover, the Court says, as the  
16 Bankruptcy Court noted, referring to the Dow Bankruptcy  
17 Court, post-petition interests does not serve to continue  
18 the contractual rights which form the basis of the  
19 underlying claim. That's what you are seeking to do. You  
20 are seeking to preserve the contractual rights which you say  
21 form the basis of your underlying claim. That's what you're  
22 saying. Look, there's that rate. It floats. Forget that  
23 it floats. I want to keep the fact that it's that rate, but  
24 I want to fix it. And the Court then goes on to say that  
25 but rather -- again quoting the Dow Bankruptcy Court,

1 "serves to compensate the successful party for any delay  
2 that occurs between the time of entitlement and the time of  
3 payment."

4 MR. GLICKMAN: I completely agree, Your Honor.  
5 And that --

6 THE COURT: And that's where the plan comes in,  
7 because the plan, among other things as you know, plans say  
8 what your entitlement is to post-petition interests. It  
9 says what it is, as plain as day.

10 MR. GLICKMAN: They made exactly this argument in  
11 Dow. What they said -- in Dow, the plan provided for the  
12 contract rate. So the debtor argued, just the way they're  
13 arguing here. You want your benefit of the bargain? The  
14 contract floats. So it keeps floating past the petition  
15 date. That's the argument that they made in Dow. And the  
16 language that you're quoting, Judge, is when the Court said  
17 no. Once you get to the petition date, even though it's  
18 going to be the contract's rate -- once you get to the  
19 petition date, there's another factor that comes into play.

20 THE COURT: So you're telling me to rely on the  
21 Dow District Court decision?

22 MR. GLICKMAN: Because its reasoning is  
23 persuasive. It's obviously not binding. It's a Michigan  
24 case.

25 THE COURT: Okay.

1 MR. GLICKMAN: So let me mention one other, I  
2 think, important factor. If you look at why the federal  
3 judgment rate freezes the floating treasury rate as of the  
4 judgment date, I think it's instructive. Bankruptcy Courts  
5 have used the federal judgment rate for the petition date.  
6 And I think the reason that the statute fixes it is very  
7 instructive. They said it's because of the statutory  
8 language. I agree. The question is why was that statutory  
9 language put in there that says you'd freeze it as of the  
10 judgment date?

11 So after we got the reply brief, we went and we  
12 looked to see if there was a case that explains why the  
13 federal judgment rate freezes an otherwise floating rate as  
14 a judgment. What's the thinking? What's the rationale?

15 It turns out the United States Supreme Court  
16 specifically addressed that question in a case called Kaiser  
17 Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990).  
18 So the Supreme Court tried to explain why would Congress fix  
19 this otherwise floating rate as of the judgment rate. And  
20 this is how they explained it. It's so that at the time  
21 judgment is entered, the parties are capable of calculating  
22 the value or cost or the interest throughout the time period  
23 during which the judgment remains unpaid. In other words,  
24 on the date of judgment, expectations with respect to  
25 interest liability were fixed so that the parties could make

1 informed decisions about the cost and potential benefits of  
2 paying the judgment or appealing or litigating it or  
3 whatever. So --

4 THE COURT: It makes total sense to me.

5 MR. GLICKMAN: Right. So --

6 THE COURT: They're smart, that Supreme Court,  
7 aren't they?

8 MR. GLICKMAN: They're smart and Congress was even  
9 smarter. So the same principle applies here. If you fix  
10 the rate as of --

11 THE COURT: No, the same principle applies here  
12 because when you buy a claim, you need to understand what  
13 you're buying. Period.

14 MR. GLICKMAN: Yes, I agree with that. So the  
15 question is -- Your Honor, there is a legal question as to  
16 when you -- if you have a contract with a floating rate,  
17 right, do you freeze the rate as of the petition date?  
18 That's like a yes or no legal question. And our point is  
19 the same principle that applies to the federal judgment rate  
20 applies here. It will give clarity to debtors to know what  
21 the rate is. And Your Honor is right. If you take a pure  
22 benefit of the bargain approach, you keep it floating. But  
23 what the Dow Court says is hybrid consideration once you  
24 have the petition date, not just benefit of the bargain but  
25 compensation for delay. The Supreme Court says certainty.

1 That's her position. It's not a pure benefit of the bargain  
2 analysis once you get to the petition date. That's --

3 THE COURT: So it's benefit of the bargain when it  
4 benefits you, but it's not benefit of the bargain when it  
5 doesn't benefit you.

6 MR. GLICKMAN: Well, in fairness, Judge --

7 THE COURT: I really do have to in fairness  
8 observe that I think there's a tremendous amount of  
9 inconsistency between the parts of the various so-called  
10 underlying documents and agreements that you want to have me  
11 follow, and hue to, and count and those that you don't. And  
12 the ones -- and it all leads to a very, very large number  
13 that if there were consistent approach to what counts and  
14 what doesn't count, the number would be smaller.

15 MR. GLICKMAN: But, Your Honor, just on that point  
16 and it was mentioned by Mr. Fail as well. I mean, they're  
17 arguing for a number that they want. And they're trying to  
18 persuade the Court that you can get to their number by  
19 applying legal principles properly. That's what advocates  
20 do. I'm an advocate for my client.

21 THE COURT: Sure. I'm not --

22 MR. GLICKMAN: And I'm not just -- my -- I could  
23 say if you let that rate float, do you know what the  
24 interest rate is? It's 0.26 percent. I'm not saying to  
25 Mr. Fail, you're just making the floating argument because

1 you want this really low rate. That's all you're doing.  
2 He's an advocate. He's advocating for his position. He's  
3 trying to make a concerted legal argument that in principle  
4 it should be floating. It's better for his client if it's  
5 floating. It's better for my client if it's fixed. But I'm  
6 trying to do what he's doing. I'm making a concerted legal  
7 argument that it should be fixed.

8 And if Your Honor reaches this question, it's  
9 going to apply, right -- this decision in the Southern  
10 District of New York will be watched and read, and it will  
11 apply in a lot of cases. And sometimes the floating rate is  
12 not going to be lower than the fixed rate. It's going to  
13 cut different ways. It cuts my client's way in this case.  
14 But to say that's the only reason I'm up here arguing it, I  
15 could say the same thing that -- why he's arguing floating.

16 I mean, in every case we're advocates and we try  
17 to persuade Judges that the principles support where we want  
18 to go.

19 THE COURT: Of course.

20 MR. GLICKMAN: That's what I do. So -- okay.

21 THE COURT: And very well.

22 MR. GLICKMAN: Thank you. Judge, there's one  
23 issue and I tremble at suggesting this.

24 THE COURT: You don't.

25 MR. GLICKMAN: But if Your Honor rules that the

1 settlement --

2 THE COURT: It's interesting, though, because the  
3 federal rate is higher than the floating rate, right?

4 MR. GLICKMAN: It depends.

5 THE COURT: Well, that's what Mr. Fail is telling  
6 me, right? So, you know, so just in terms of --

7 MR. GLICKMAN: Yeah, it's high -- it is, yes.

8 THE COURT: The consistency, right -- I mean, if  
9 we were -- if I was really going to accuse each of you of,  
10 you know, just being lawyers, I mean -- and Mr. Fail is also  
11 a fiduciary.

12 MR. GLICKMAN: I'm a fiduciary of my client as  
13 well.

14 THE COURT: I understand, but in a different way  
15 that Mr. Fail is a fiduciary.

16 MR. GLICKMAN: And I've never changed my position  
17 in this case, Your Honor.

18 THE COURT: Well --

19 MR. GLICKMAN: You can tell me that there are  
20 inconsistencies. I get it. I get it. It's complicated.  
21 But I've been consistent in my position. Let me --

22 THE COURT: I prefer to keep things simple when I  
23 can.

24 MR. GLICKMAN: Okay.

25 THE COURT: I hear you about how you're viewing

1 the broad sweeping significance of the questions that you're  
2 putting before me. I'm not going to -- I would reach that  
3 if I have to.

4 MR. GLICKMAN: I get it. And I'm just pointing  
5 out that it could cut different ways in different cases.

6 THE COURT: Sure.

7 MR. GLICKMAN: Now we come to the very last issue.

8 THE COURT: Okay.

9 MR. GLICKMAN: Right? So this one only gets  
10 triggered if you rule their way on the settlement agreement  
11 and you say it's the statutory rate, right? Because the way  
12 the plan works is --

13 THE COURT: Right. It's the contract. If no  
14 contract, then the statutory rate.

15 MR. GLICKMAN: Right.

16 THE COURT: Okay.

17 MR. GLICKMAN: Okay? This is not what we argued  
18 in our demand, right? We argued for the GCCM. But now  
19 they've taken the positions to statutory rates, so we need  
20 to address that, okay? Just to be clear, though, we are  
21 advocating for the GCCM. But our position as to what  
22 statutory rate means, I just clear the debris just to make  
23 sure there's no misunderstanding, it's going to be a big  
24 number. We are not urging that number, Judge. We want the  
25 GCCM to apply. But if they say that the statutory rate



1 applies, then we want you to hear our position as to what  
2 statutory rate means, okay?

3 It's an 8 percent number. It's a 5 percent number  
4 if you use the GCCM all the way. But just because  
5 everybody's been throwing around where these numbers come  
6 out, the number is a larger number. What did we say, just  
7 cutting through it. They say the statutory rate means the  
8 federal judgment rate, okay? We say, not so fast. The  
9 statutory rate, logically, should mean the applicable law in  
10 terms of the nexus of the transaction. And here, there is a  
11 statutory rate under English law, which we say should apply,  
12 which is the Judgment's Act of 1838, which provides for 8  
13 percent.

14 How do we get to that? I just -- let me just run  
15 through the argument, okay? So what they --

16 THE COURT: So just again to continue the theme of  
17 inconsistency, okay, what did I have? Judge, Bankruptcy  
18 Code, Bankruptcy Code. And now enter the English Judgment's  
19 Act of 1838.

20 MR. GLICKMAN: Well --

21 THE COURT: It's --

22 MR. GLICKMAN: Your Honor, yes, absolutely apply  
23 the U.S. Bankruptcy Code. But in U.S. bankruptcies, you can  
24 absolutely apply foreign law. It's not inconsistent to say  
25 that you can incorporate. And I'll cite you a bankruptcy

1 case that did it.

2 THE COURT: I know. My --

3 MR. GLICKMAN: Federal cases do that all the time.

4 THE COURT: My predecessor, in fact, in this  
5 job --

6 MR. GLICKMAN: Judge Peck?

7 THE COURT: Judge Peck.

8 MR. GLICKMAN: My former partner.

9 THE COURT: You know, had his own views about  
10 that. But, of course, other applicable law applies.

11 MR. GLICKMAN: Right.

12 THE COURT: Of course it does.

13 MR. GLICKMAN: So let me make my case --

14 THE COURT: But where appropriate.

15 MR. GLICKMAN: -- that it does here.

16 THE COURT: Sure.

17 MR. GLICKMAN: All right? So what they say is the  
18 majority view is that the term legal rate means the federal  
19 judgment rate. That's their principal argument. So our  
20 response is, okay, there's kind of a big problem up front,  
21 which is that the term legal rate isn't at issue here.

22 THE COURT: Well, but Dow Corning, the case that  
23 urged me to follow --

24 MR. GLICKMAN: Yes.

25 THE COURT: -- is not going to agree with you on

1 this point.

2 MR. GLICKMAN: Why?

3 THE COURT: You don't get to ask the questions.

4 MR. GLICKMAN: I'm just trying to engage -- I  
5 don't think that Court reached the federal judgment rate.  
6 It was a contract rate.

7 THE COURT: I think its observations would be  
8 inconsistent with the notion that English law would apply  
9 under these facts and circumstances. Let me stop  
10 interrupting you. Why don't you just continue?

11 MR. GLICKMAN: Okay, so I can dig through it  
12 fairly quickly. What they set out for the Court is, look,  
13 there's a majority view and a minority view in terms of how  
14 you interpret the term legal rate. So our first response to  
15 that is to say that's nice, but that's not the term that  
16 we're trying to interpret here. The term here is statutory  
17 rate.

18 THE COURT: Right.

19 MR. GLICKMAN: And they can say, well, it's close.  
20 But sophisticated lawyers put the plan together. They knew  
21 about the jurisprudence on legal rate. They chose to use  
22 the word statutory rate. And by the way, they chose not to  
23 say the federal judgment rate, which they could easily have  
24 done.

25 Another point. When they talk about the minority

1 view with respect to what legal rate means, even though  
2 legal rate is not the term here, but it's interesting. It's  
3 interesting how those minority cases interpret legal rate.  
4 They interpret it to mean the following. At the contract  
5 rate, or if a contract rate does not exist at the otherwise  
6 applicable state statutory rate, that's identical to the  
7 plan here, except for the word state, which I'll come back  
8 to. But it sure looks like, if anybody was thinking about  
9 this, they used the minority view in terms of what statutory  
10 rate should be.

11 So our view would be by not putting in the word  
12 state statutory rate, it allows even more flexibility. I  
13 mean, look, obviously the idea of putting something in a  
14 plan that says your contract rate or your state statutory  
15 rate, it's to give greater flexibility, right? It's not  
16 just one size fits all, federal judgment rate. If you have  
17 a contract, you can get your contract rate. If you don't  
18 have a contract, we'll look to your local state for the  
19 rate. The idea is to tailor it. All right?

20 So in this case, the plan didn't even qualify  
21 statutory rate with the word state. Our argument is you can  
22 use the statutory rate from anywhere that would apply. If  
23 it makes more sense to apply the federal, if it makes more  
24 sense to apply the state, if it makes more sense to apply  
25 the law of England, then you apply the law of England. And

1 we've cited to Your Honor a case where Bankruptcy Courts  
2 have applied foreign rates where there's a foreign nexus.  
3 And that's the In re Azabu Buildings case at 383 Bankruptcy  
4 738 where they awarded post-judgment interest at the  
5 Japanese judgment rate because "Japan has the most  
6 significant relationship to the parties, the transaction,  
7 and the judgment." If the Court's with me so far in terms  
8 of the reasoning, now we come to something that Courts are  
9 very familiar with, which is basically a context test, where  
10 you look and see what the relevant contexts are. You say  
11 which jurisdiction has the most relevant nexus. So I'll  
12 make my quick case, then it's the UK, and I'll tell you what  
13 they say. All right?

14 The funds were denominated in British pounds.  
15 They say that doesn't matter. It was converted to dollars  
16 at the beginning of the bankruptcy. Well, that's pursuant  
17 to statute. It doesn't change the fact that the rates were  
18 denominated in Great British pounds. They were owed to  
19 Lehman Re, which is a Bermuda entity, which is a British  
20 territory. It doesn't have the same laws necessarily as  
21 Britain, as they point out, but it's a British territory.  
22 What were they for? What was this money even for? It was  
23 collateral for a reinsurance agreement that Lehman Re had  
24 with a British entity, called Britannia Life Limited. And  
25 before they were transferred to LBCC, the debtor here, they

1 were held in custody for Lehman Re by another British entity  
2 called Libby British.

3 The custody agreement that Libby was holding it  
4 with respect to was under UK law.

5 THE COURT: You have an allowed claim that's  
6 denominated in U.S. dollars pursuant to a plan approved in a  
7 Bankruptcy Court in the United States.

8 MR. GLICKMAN: Should that matter, though, is the  
9 question. I take that point, Your Honor. I agree that  
10 that's the case.

11 THE COURT: There's all kinds of interest rate  
12 arbitrages that can go on and that have, in fact, been  
13 attempted in this case in order to take advantage of  
14 interest rate fluctuations. And to suggest at some later  
15 point in time that a different interest rate should pertain  
16 because the original claim or transaction was denominated in  
17 a foreign currency, it would be unfair. It would be  
18 uncertain. And it would be incapable of being administered.  
19 And it would set up a plan that involves claims that arise  
20 or are connected with foreign law as an endless arbitrage  
21 opportunity.

22 MR. GLICKMAN: Well, Your Honor, I'll respond to  
23 that. Your Honor has made two points. One, it's in U.S.  
24 Court. Two, it's converted to U.S. currency. So let me  
25 just take them one at a time.

1           It's a U.S. Court, I get it. But my point is that  
2           can't be dispositive because U.S. Courts, State Courts, all  
3           the time make decisions based on foreign law when they  
4           conclude foreign law is applicable based on the context.

5           THE COURT: I don't disagree with that general  
6           statement.

7           MR. GLICKMAN: Okay. Then the next question is  
8           does the conversion that's required under 502(b) to dollars  
9           take away all of the British connections here? Not just the  
10          British connections with respect to what the currency used  
11          to be, but all -- the fact that all of these entities, for  
12          the most part, were British. My position would be I get  
13          that it's converted to U.S. dollars. It's converted to U.S.  
14          dollars for the same reason that we're in a U.S. Court. You  
15          can't have a claim in a U.S. Court that's denominated in  
16          something other than dollars. That doesn't go to what  
17          jurisdiction has the most relevant nexus to this  
18          transaction. That's our position. You can obviously agree  
19          or disagree, but that's our position. I think it's a  
20          coherent position.

21          Now, they point out that LBCC, the transferee, the  
22          debtor here, was a U.S. company. 100 percent true. That's  
23          a point for them. And the way these analysis are done, you  
24          just look at the whole matrix and you decide where it tips.  
25          We have five British connections. They have one U.S.

1 connection.

2 They also say the GCCM governs transactions  
3 headquartered in the United States. But the GCCM doesn't  
4 apply here because remember, we're assuming. We don't get  
5 to this argument unless you've thrown the GCCM out the  
6 window and you're saying you've got to do the statutory  
7 rate. So that's irrelevant.

8 So look, I think we've covered --

9 THE COURT: Okay. I think it's time to wrap it  
10 up.

11 MR. GLICKMAN: I think we've covered the issue,  
12 Your Honor understands our position.

13 THE COURT: Mr. Dorchak, do you have anything  
14 else?

15 MR. GLICKMAN: And thank you very much for taking  
16 the time to listen to us.

17 THE COURT: Sure. Of course. Do you have  
18 anything else?

19 MR. DORCHAK: Nothing further, Your Honor.

20 THE COURT: Okay. Thank you. Mr. Fail, thank  
21 you, very interesting.

22 MR. FAIL: Thank you, Your Honor. We have nothing  
23 further. I think all of the points that were raised today  
24 were addressed in our pleadings.

25 THE COURT: Okay.



1 MR. FAIL: And if you have any questions, I'm  
2 happy to answer them.

3 THE COURT: Okay. All right. I'm going to give  
4 it some substantial thought. You've made a lot of very  
5 interesting points. I appreciate you taking such a long  
6 time to present them. And I wish you a good day. Thank  
7 you.

8 (Chorus of thank you)

9 (Whereupon these proceedings were concluded at 1:59 PM)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

We, Dawn South and Jamie Gallagher, certify that the  
foregoing transcript is a true and accurate record of the  
proceedings.

Dawn South

Digitally signed by Dawn South  
DN: cn=Dawn South, o=Veritext, ou,  
email=digital@veritext.com, c=US  
Date: 2016.10.10 14:07:00 -04'00'

Dawn South

AAERT Certified Electronic Transcriber CET\*\*D-408

Jamie Gallagher

Digitally signed by Jamie Gallagher  
DN: cn=Jamie Gallagher, o=Veritext,  
ou, email=digital@veritext.com, c=US  
Date: 2016.10.10 14:07:25 -04'00'

Jamie Gallagher

Date: October 10, 2016

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501